

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Federal Preemption of)
Anne Arundel County Ordinance)
Regulating Radio Frequency Interference)

DA 02-1044

To: Wireless Telecommunications Bureau
Commercial Wireless Division

**COMMENTS
OF
WEBLINK WIRELESS, INC.**

WebLink Wireless, Inc. ("WebLink"), by its attorneys, hereby submits its Comments on the Petition for Declaratory Ruling ("Petition") and the Supplement to Petition for Declaratory Ruling submitted to the Federal Communications Commission (the "FCC" or "Commission") on April 23, 2002 and April 29, 2002 respectively, by Cingular Wireless LLC ("Cingular") in connection with recent amendments to the Anne Arundel County, Maryland ("Anne Arundel") zoning ordinance.¹ The Commission sought Comments on this Petition by Public Notice, DA 02-1044, released on May 7, 2002. Comments were to be filed by June 10, 2002.

WebLink agrees with Cingular's position that the amendments to the Anne Arundel Ordinance must be declared to be preempted by the Commission because Anne

¹ Article 28 §§ 1-101(14B), 1-128(a), (c) and 10-125(j)(1)-(2) and (k)(1)-(2) of the Anne Arundel County Code ("Ordinance"). The amendments were adopted on January 22, 2002, and went into effect 45 days later, on March 8, 2002.

Arundel has illegally intruded into the FCC's exclusive jurisdiction to regulate the operations of FCC licensed facilities, including radio frequency interference ("RFI"). As discussed below, the FCC's exclusive jurisdiction was established by Congress through the Telecommunications Act of 1934, as amended and affirmed by court precedent.

The following is respectfully shown:

I.

INTRODUCTION

WebLink is a nationwide paging carrier located in Dallas, Texas. It is a leader in the wireless data industry, providing wireless email, wireless messaging, information on demand and traditional paging services throughout the United States. WebLink licenses tower space throughout the nation to provide its telecommunications services.

WebLink operates at two sites in Anne Arundel County, in Crownsville and Annapolis, Maryland, and is therefore, a user of telecommunications facilities, which is encompassed by the Anne Arundel Ordinance.² As a user of telecommunications facilities, the current Anne Arundel Ordinance requires that WebLink (i) obtain a zoning certificate prior to using or altering the facilities with respect to *technical, operational* modifications, such as configuration, transmit frequency or power level,³ and (ii) prior to receiving a zoning certificate, obtain a "certification from an independent consultant acceptable to the Director of the Department of Inspections and Permits that the facility will not degrade or interfere with the County's public safety communications systems."⁴ Finally, if WebLink ever degrades or interferes with the County's communication system

² Article 28 § 1-128(c).

³ Article 28 § 1-128(a)

⁴ Article 28 § 10-125(j)(1).

or cannot make the engineering certification, the Ordinance states that WebLink's use certificate could be revoked.⁵

Based on the unambiguous requirements of the Ordinance, WebLink asserts that Anne Arundel is imposing unnecessary *and* prohibited burdens on wireless telecommunications carriers. Because it will be affected by these burdens, WebLink has sufficient interest to file Comments in this proceeding.

II.

THE FCC HAS EXCLUSIVE JURISDICTION OVER RFI

As Cingular points out in its Petition, Congress has granted the Commission exclusive jurisdiction by the Communications Act of 1934 to regulate RFI.⁶ Most significantly, Congress in 1982 reaffirmed "the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI" stating that the "Conferees intend that regulation of RFI phenomena shall be imposed *only* by the Commission."⁷

Furthermore, this exclusive jurisdiction has been confirmed by the courts. The Supreme Court has affirmed the FCC's jurisdiction over the radio signal transmissions and RFI as "clearly exhaustive."⁸ The United States Court of Appeals for the Second Circuit also stated: "We conclude that allowing local zoning authorities to condition construction and use permits on any requirement to eliminate or remedy RF interference 'stands as an obstacle to the accomplishment and execution of the full purposes and

⁵ Article 28 §§ 10-125(j)(2), (K)(2).

⁶ See Petition at 3-5.

⁷ H.R. Conf. Rep. No. 765, 97th Congress, 2d Sess. 33 (1982), reprinted in 1982 U.S.C.C.A.N. 2261, 2277. (Emphasis Added.)

⁸ Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 430 n.6 (1963).

objectives of Congress..."⁹ Various other courts have recognized the FCC's exclusive jurisdiction over RFI, as well.¹⁰

As Cingular states in its Petition,¹¹ regardless of Anne Arundel's efforts in its Ordinance to protect its public safety communications system from interference, the Federal Communications Commission has rules that govern interference complaints,¹² which Anne Arundel can use at any time, if such interference occurs. Given that Congress has given exclusive jurisdiction and the courts have affirmed it, the Commission has the sole jurisdiction over RFI and the only forum to resolve interference issues would be at the FCC.

III.

THE ORDINANCE MUST BE PREEMPTED

As stated above, the Ordinance requires a so-called zoning certificate prior to using or altering the facilities with respect to *technical, operational* modifications of the telecommunications facilities, such as *configuration, transmit frequency or power level*. Further, prior to receiving a zoning certificate, carriers must obtain a certification from an independent consultant that the facility will not *degrade or interfere* with the County's

⁹ Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 325 (2nd Cir.)(citing Fidelity Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1983)).

¹⁰ Broyde v. Gotham Tower, Inc., 13 F.3d 994, 998 (6th Cir.), cert. denied, 511 U.S. 1128 (1994); Great Lakes Wireless Talking Machine Co. v. Hayes, No. CIV-91-6140T, slip op. at 9 (W.D.N.Y. Jun. 25, 1991); Still v. Michaels, 791 F. Supp. 248, 252 (D. Ariz. 1992); Blackburn v. Doubleday Broadcasting Co., 353 N.W. 2d 550, 556-57 (Minn. 1984); Helm v. Louisville Two-Way Radio Corp., 667 S.W.2d 691, 693 (Ky. 1984); Fetterman v. Green, 689 A.2d 289, 294 (Pa. Super.), appeal denied, 695 A.2d 786 (1997); Still v. Michaels, 803 P.2d 124, 125 (Ariz. App. 1990) review denied (1991); Smith v. Calvary Educ. Broadcasting Network, 783 S.W.2d 533, 536-537 (Mo.Ct.App. 1990).

¹¹ Petition at 6.

¹² 47 C.F.R. §§ 1.929, 1.947, 22.352 and 22.353.

public safety communications systems. Finally, Anne Arundel, through its administrator, can determine that *interference* exists and force carriers to *cease operations*.¹³

Clearly the Ordinance extends beyond the jurisdictional restrictions established by Congress in 47 U.S.C. § 332 (c)(7)(A), which states that:

nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the *placement, construction and modification* of personal wireless service facilities. (Emphasis Added.)

47 U.S.C. § 332 (c)(7)(A) limits the state and local governments to a review of the physical placement of facilities for traditional zoning purposes only, not as to the operations of the facilities. As the Commission has stated, a local government may not restrict how "a facility authorized by the Commission *may operate* based on RF emissions *or any other cause*. We note that the Commission's plenary authority in this area has recently been upheld by the courts."¹⁴ (Emphasis Added.) The Commission went on to cite Cellular Phone Taskforce,¹⁵ which confirms:

Section 332(c)(7)(B)(iv) does not amount to clear congressional intent to permit state and local governments to regulate the operation of such facilities. The FCC's interpretation is therefore entitled to deference and, because the FCC's interpretation is reasonable, we are bound to accept it.¹⁶

¹³ Article 28 §§1-128(a) and (c) and 10-125(j)(1)-(2) and (k)(1)-(2).

¹⁴ Report and Order, FCC 00-408, 15 FCC Rcd 22821, 22828 (2000)

¹⁵ Procedures for Reviewing Requests for Relieve from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Telecommunications Acts of 1934, WT Docket No. 97-192, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 13494, 13540-60, ¶¶ 115-54 (1997) ("RF Procedures Notice") aff'd Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2d Cir. 2000) ("Cellular Phone Taskforce").

¹⁶ Id at 95-95.

Accordingly, there can be no debate regarding the impermissibility of Anne Arundel's intrusion into regulating telecommunications operations. With such clear directives from Congress and consistent rulings of the courts in similar circumstances involving RFI issues, the Commission must issue a Declaratory Order preempting the amendments to the Anne Arundel Ordinance.

VI.

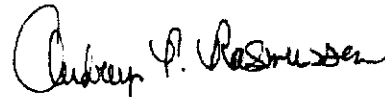
CONCLUSION

WHEREFORE, the foregoing having been duly considered, Weblink Wireless, Inc. respectfully request that the Commission issue a Declaratory Ruling preempting the referenced amendments to the Anne Arundel County zoning ordinance.

Respectfully submitted,

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